Supreme Court, U.S.
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No. 08-273

In the Supreme Court of the United States

DAVID M. CLAPPER,

Petitioner,

v.

TACCO FALCON POINT, INC.,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The question presented by Petitioner is not only misleading and inaccurate, but is predicated on a false recitation of the proceedings in Michigan.

First, Petitioner asserts in this section of his brief that, in Michigan, the Respondent conceded that under *Indiana substantive law*, the judgment at issue would be deemed satisfied. This is completely false. In fact, Respondent was not silent on this issue in Michigan, but rather argued repeatedly that, even under Indiana law, Petitioner's satisfaction argument fails. For Petitioner to now falsely represent to this Court that admissions or concessions were made in the lower courts that were, in fact, never made, is not only disingenuous, but intentionally misleading.

Next, as a result of the application of Michigan law to Petitioner's enforcement defenses, Petitioner states that the "Michigan courts therefore ruled that the Indiana judgment may be domesticated and enforced in Michigan, even though the state of rendition (Indiana) would deem the judgment satisfied." This statement is misleading on 2 separate grounds. First, the Michigan courts never addressed the application of Petitioner's defenses to the *domestication* of the judgment. Since there was no dispute regarding the validity and entry of the judgment in Indiana, its domestication was essentially automatic. Second, the Michigan courts never determined that Indiana "would deem the judgment satisfied". Again, this is an utterly false and intentionally misleading representation of the proceedings that occurred in Michigan.

Finally, the question presented by Petitioner does not comport with the proceedings of the lower courts. First, there is no issue regarding the domestication of the judgment. Petitioner has never opposed or appealed the order of the Trial Court domesticating the judgment at issue. It is only Respondent's right to enforce the judgment that Petitioner appealed. Second, the real question being presented to this Court (and which is simply not worthy of review) is whether Petitioner, by challenging Respondent's ability to enforce, and collect upon, the judgment, was merely raising defenses to the enforcement of the judgment in Michigan, thereby subjecting these defenses to the application of Michigan law.

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COUNTER STATEMENT OF THE CASE

During the course of more than 6 years of legal proceedings, Petitioner has demonstrated a penchant for misstating the facts and history of this dispute. The brief filed with this Court is no different. To establish a clear and accurate record, Respondent makes the following "corrections" to the Petitioner's Statement of the Case:

1. Petitioner states that on February 19, 2002, Inland Mortgage Corporation ("Inland") "secured" a judgment in Indiana state court (the "Judgment") against Petitioner and others. Petitioner, however, has conveniently failed to inform this Court that the Indiana Judgment was a "consent judgment", entered into freely and willingly by Petitioner. As such, Petitioner has not (and cannot) contest the validity or entry of the Judgment.

2. While Petitioner correctly states that the Michigan Trial Court and Court of Appeals found that Michigan law applied to the enforcement of the Judgment in Michigan, and that under Michigan law the Judgment had not been satisfied, Petitioner also represents to this Court that the Trial Court agreed that under Indiana law the Judgment would be deemed satisfied. This statement is patently false. Interestingly, Petitioner fails to attach to his brief a copy of the transcript from the Trial Court's decision. This is no accident. Petitioner has intentionally omitted this transcript because nowhere in its opinion did the Trial

> Court find that Judgment would be deemed satisfied under Indiana law. (A copy of the May 31, 2006, Transcript of Hearing of Oakland County Circuit Court is reproduced in Appendix A, App. 1b.)

Essentially, the Trial Court held that Petitioner's defenses were not an attack on the validity of the Judgment itself, but rather defenses to the enforcement of the Judgment (Respondent was seeking to enforce, and collect upon, a valid Judgment entered by an Indiana state court). As such, the Trial Court held that Michigan law applied in determining the validity of all of Petitioner's defenses under the Uniform Enforcement of Foreign Judgments Act, and in accordance with the Full Faith and Credit Clause of the United States Constitution. Based on the undisputed fact that Respondent had never received payment on the Judgment, and Michigan does not recognize the "strawman" theory being espoused by Petitioner, the Trial Court found that Respondent was now free to enforce and collect upon the Judgment.

In a 2 to 1 decision, and in all respects, the Michigan Court of Appeals affirmed the holding of the Trial Court. In short, the Court of Appeals found that (i) this was an enforcement proceeding (regardless of how Petitioner tried to characterize it), (ii) Michigan law, not Indiana law, therefore applied to the defenses Petitioner raised in this action, and (iii) Michigan law does not recognize the "strawman" defense raised by Petitioner.

Lost on Petitioner is the fact that the domestication in Michigan of a valid Indiana Judgment is in

compliance with, and precisely the purpose of, the Full Faith and Credit Clause of the United States Constitution. Once Michigan gives full faith and credit to a valid foreign judgment, the enforcement of that judgment by the judgment holder, in this case Respondent, is governed by the laws of the forum state, in this case Michigan. Petitioner is not arguing, nor has he ever argued, that the Judgment is somehow flawed, invalid, or otherwise subject to attack. Rather, he argues that it has been satisfied under Indiana law as a result of post-judgment events. This argument goes directly to the ability to enforce the Judgment, and is therefore subject to Michigan law.

COUNTER STATEMENT OF THE FACTS

Similar to Petitioner's Statement of the Case, Petitioner has also misrepresented to this Court the factual background of this dispute. As such, although Respondent believes the factual background giving rise to the entry of the Judgment is immaterial to this Court's determination of whether to review the holdings of the Trial Court and Michigan Court of Appeals, Respondent is nevertheless compelled once again to identify for this Court factual misrepresentations made by Petitioner in his brief. Rather than try to correct each misstatement individually (there are too many to be able to do this efficiently), Respondent instead will identify for this Court the undisputed facts that led the lower courts to determine, as a matter of law, that Respondent was entitled to summary disposition and the right to enforce the Judgment. These facts are as follows:

1. Petitioner guaranteed payments to Inland with respect to a loan that Inland made, and which was secured by an apartment complex in Indiana.

2. Through a series of unrelated transactions, third-party defendant American Realty Trust, Inc. ("ART") became a co-debtor with Petitioner with respect to the Inland loan.

3. The loan ultimately went into default, and Inland sued Petitioner and the other co-debtors (including ART) for the balance due, and sought to foreclose on the apartment complex in Indiana.

4. All of the parties to the case initiated by Inland, including Petitioner, *willingly consented to entry of the Judgment against them for $3.2 Million*.

5. ART negotiated a separate agreement with Inland that permitted a buyer, if one could be found, to purchase the Judgment from Inland for $3 Million, payable with $1.5 Million in cash and a $1.5 Million Note.

6. TacCo Financial, Inc., which was owned entirely by 2 separate and distinct companies, which in turn were owned entirely by 2 individuals, Wayne Starr and J.T. Tackett, found out that the Judgment was being offered at a reduced price, which included the rights to foreclose on, and acquire, the apartment complex in Indiana.

7. TacCo Financial was interested in acquiring the Judgment and the apartment complex in Indiana as it was in the business of buying distressed properties.

8. After TacCo Financial entered into negotiations with Inland to acquire the Judgment, Inland indicated that it would only transfer the Judgment to a single asset entity. Thus, the principals of TacCo Financial—Starr and Tackett, decided to incorporate a new entity, TacCo Falcon Point, Inc (Respondent in these proceedings).

9. Not a single party to the Consent Judgment entered in Indiana, including ART, are, or were ever, principals in TacCo Financial or TacCo Falcon Point. Similarly, neither Mr. Starr nor Mr. Tackett, or either of their companies, are principals, shareholders, or in any way affiliated with any of the debtors under the Consent Judgment, including ART.

10. Respondent ultimately concluded its negotiations with Inland to purchase the Judgment. As Respondent was a newly created entity, however, it borrowed the money from its parent, TacCo Financial, to make the initial $1.5 Million payment to Inland. TacCo Financial, in turn, borrowed the money from One Realco, another company that has no affiliation with ART.

11. Subsequent to Respondent's purchase of the Judgment, the apartment complex in Indiana

was sold at a judicially conducted foreclosure sale for $1 Million. Respondent acquired the property through a credit bid for $1 Million. Respondent was the only bidder at the foreclosure sale. Petitioner, despite having received notice of the sale, did not appear and did not bid on the property.

12. Respondent has never been paid a penny from Petitioner, or any other party, on the Judgment it acquired from Inland, although the Judgment has been reduced by the $1 Million bid on the property at the foreclosure sale, leaving a balance due, with interest, of more than $2.5 Million.[1]

Again, these facts are not being presented to this Court because they are material to the question of whether this Court should now grant the Petition before it. They are presented to demonstrate to this Court that Respondent does not accept Petitioner's rendition of the factual history of this dispute. In truth, the only relevant facts in determining whether to grant this Petition and review the decisions of the lower courts are that (i) Petitioner entered into a consent judgment in Indiana for $3.2 Million against him, (ii) Petitioner has never contested the validity or entry of the Judgment in Indiana, nor has he contested that the Judgment was properly domesticated in Michigan, and (iii) no responsible party under the

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[1] See Respondent's Response Brief in Opposition to Petitioner's Motion for Summary Disposition, pp. 4-5, and Respondent's Brief in Support of its Motion for Summary Disposition, Exhibits 1, 2, 3, 4 and 5 (Oak. Ct. Cir. Ct.)

Judgment, including Petitioner, has ever paid a dime toward satisfying it. The lower courts, when viewing these facts in conjunction with Michigan's enforcement proceedings, found that Respondent was entitled to summary disposition, and the right to immediately enforce and collect on the Judgment.

Finally, it is important to note that in this section of his brief, Petitioner once again attempts to mislead this Court with respect to the decision of the Trial Court, stating that "the Trial Court appeared to concede that if Indiana law applied, the judgment would be deemed satisfied". As stated earlier, this is entirely untrue. This time, however, Petitioner actually cites to the record to provide what he believes is support for this assertion. Yet, the quote Petitioner provides from the Trial Court's transcript provides no such support. Contrary to the repeated assertions of Petitioner, the Trial Court never found that Petitioner's strawman argument was valid, or meritorious, under Indiana law. Rather, the Trial Court merely stated that the strawman defense is *available* in Indiana, stating: "...the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana".[2]

Is it possible that Petitioner has truly interpreted this statement to mean that the Trial Court found that the Judgment would be satisfied if Indiana law applied? Of course not. Nobody could. Instead, Petitioner's reliance on this statement from the Trial

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[2] App. A, p. 14b.

Court as support for his claim that he would "prevail" under Indiana law, illustrates how desperate he has become to bolster his argument that the application of Michigan law to this proceeding has stripped him of an otherwise viable and meritorious defense to the enforcement of the Judgment. In reality, Petitioner's "strawman" defense fails under either jurisdiction, as was pointed in out in great detail to the lower courts.[3] Nevertheless, and in direct contradiction to the repeated representations of the Petitioner in his brief filed in this Court, no court has ever decided the merits of the "strawman" defense.

SUMMARY OF THE ARGUMENT

Once again, as Petitioner has repeatedly done throughout these proceedings, he is attempting to frame the argument for this Court as if it were now being asked determine which state's defenses apply *to the Judgment itself.* Petitioner has stated in his brief that the question before this Court is whether the Full Faith and Credit Clause permits a state that has domesticated a foreign judgment to apply the substantive law of the state of rendition to defenses to the judgment. While Petitioner might prefer that this were actually the argument decided by the lower courts and now being presented to this Court, it is not. As Petitioner is fully aware, he has never attacked the validity of the Judgment or, for that matter, the Indiana state court's entry of the Judgment. How can

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[3] See Respondent's Response Brief in Opposition to Petitioner's Motion for Summary Disposition, and Respondent's Brief in Support of its Motion for Summary Disposition (Oak. Ct. Cir. Ct.).

he...he consented to the Judgment. Rather, he has simply claimed, time and time again, that the Judgment cannot be *enforced* against him because, *after its entry*, it was satisfied under Indiana law in accordance with his "strawman" theory. This argument is not a defense to the Judgment itself. Rather, as the Trial Court and Michigan Court of Appeals found, this argument is simply a defense to the "enforcement" of the Judgment, and therefore subject to Michigan law.

In short, Petitioner consented to the Judgment in Indiana. This fact is not in dispute. In addition, Petitioner has never alleged that the Judgment is somehow invalid, or that it was entered in error by the state court in Indiana. This fact is also not in dispute. Moreover, Petitioner has never appealed the decision of the Trial Court (which was made prior to the entry of the summary disposition order Petitioner now challenges) domesticating the Judgment and recognizing it—or giving it *full faith and credit*—in Michigan. Instead, Petitioner, at all times, has simply challenged Respondent's right to enforce—or collect on—the Judgment, based on post-judgment activity he alleges occurred. Thus, the defenses he has raised throughout these proceedings are defenses to enforcement, not defenses to the Judgment itself. As such, these defenses are unequivocally governed by the law of the domesticating state...in this case Michigan.

This point is critically important in order to fully understand what Petitioner is asking this Court to consider. This case is not, as Petitioner suggests, about whether the lower courts in Michigan adhered to the principles of the Full Faith and Credit Clause of

the United States Constitution. Clearly, the Michigan courts did adhere to these principles by domesticating the Indiana Judgment and giving it "full faith and credit" in Michigan. Instead, this case is solely about whether the lower courts were correct in determining that this action was an enforcement proceeding, and therefore subject to Michigan law. In fact, Petitioner does not, and cannot, dispute that Michigan law applies to enforcement proceedings. Thus, Petitioner is left to dispute one, and only one, issue—whether Respondent's attempt to collect on a properly domesticated judgment is an enforcement proceeding. While Petitioner may disagree with the lower courts' determination of this question, this issue does not implicate the United States Constitution or federal law in any way, and Respondent respectfully submits that review by this Court is not warranted.

Finally, Respondent must point out that Petitioner has, once again in this section of his brief, intentionally misrepresented the procedural history of this matter, by stating that "the parties and the courts in Michigan in this case appear to agree that if Petitioner's arguments were judged by Indiana law, the state of rendition, the judgment would be satisfied." Not surprisingly, there is no citation to the record in support of this erroneous assertion. This is no accident. No citation exists to support this false and intentionally misleading statement.

Despite Petitioner's repeated representations to the contrary, the Trial Court never held that the Judgment would be deemed satisfied under Indiana law. Moreover, Respondent argued repeatedly in the lower courts that, even under Indiana law, Petitioner's

defenses to the enforcement of the Judgment still fail. Thus, there has never been either an acknowledgement that Petitioner's "strawman" defense is applicable under Indiana law, nor a decision, holding, or even a statement on the record by any lower court that the Judgment would be deemed satisfied under Indiana law.

In short, Petitioner has improperly framed the argument presented to the lower courts, and that is now being presented to this Court. He has also intentionally misrepresented both the position of the Respondent with respect to the application of Indiana law to his "strawman" theory, and the findings of the lower courts on this same issue. Most importantly, he has utterly failed to present any justification, much less a compelling justification, that would warrant granting the instant Petition and reviewing the proceedings and decisions of the Trial Court and Michigan Court of Appeals.

ARGUMENT

In determining Respondent's right to enforce the Judgment in Michigan, both the Trial Court and the Court of Appeals relied on a wealth of case law and statutory law in reaching the same decision—this action is nothing more than an enforcement proceeding that is controlled by Michigan law, and since Michigan law does not, and never has, recognized the "strawman" theory espoused by Petitioner, the Judgment has not been satisfied and remains subject to collection by Respondent.

Petitioner's arguments before this Court are not new (although he now presents them as if they impact the continued validity of the Full Faith and Credit Clause of the United States Constitution). He argued to the Trial Court and the Court of Appeals, as he argues now, that Indiana law should apply to his "strawman" defense, because—according to Petitioner—issues of satisfaction of a validly entered judgment do not involve enforcement, but somehow involve substantive defenses to the judgment itself. As the Trial Court and Court of Appeals found, this argument is nonsense. Petitioner further argued in both lower courts, as he argues now, that under the Full Faith and Credit Clause, Michigan is required to apply Indiana law to his defenses, and that the Uniform Enforcement of Foreign Judgments Act does not apply in this instance based upon the circular reasoning that if his "strawman" defense were recognized, there would be no judgment to enforce (somewhat like the argument, what comes first—the chicken or the egg). Again, the lower courts rejected these arguments, and correctly determined that (i) this is an enforcement proceeding, (ii) Michigan law applies, and (iii) Michigan does not recognize the "strawman" defense.

In reaching its decision, the Trial Court relied upon the U.S. Supreme Court decisions in *Hampton v. M'Connell,* 16 U.S. (3 Wheat.) 234; 4 L. Ed. 378 (1818), and *Baker v. General Motors Corp.*, 522 U.S. 222, 235; 118 S. Ct. 657; 139 L. Ed. 2d 580 (1998), and concluded that "the strawman defense is not available to Defendant as it is not recognized in the state of

Michigan."[4] Similarly, based upon the language of the Uniform Enforcement of Foreign Judgments Act, as well as U.S. Supreme Court precedent governing the application of the Full Faith and Credit Clause, the Court of Appeals, noting that "Clapper is merely trying to avoid enforcement of the judgment based on actions that occurred after the valid entry of the judgment," held that Michigan law applied to these enforcement proceedings.[5] The Court of Appeals then rejected Petitioner's argument that Michigan recognizes the "strawman" defense, noting that "Clapper has not cited any binding or persuasive authority indicating that the strawman defense, whether referred to as such or referred to by another name, is recognized in Michigan."[6] In summary, the Court of Appeals concluded:

> Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed, the consent judgment under which Clapper is liable remains in effect and TacCo is seeking to enforce it. (Emphasis in the original.)[7]

In his brief, Petitioner not only misconstrues the purpose of the Full Faith and Credit Clause (which is to give foreign judgments full faith and credit in all 50

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[4] App. A., p. 15b.

[5] *See* Appendix A to Petitioner's Brief, pp. 7a-8a.

[6] *See id.* at p. 8a.

[7] *See id.* at p. 7a.

states...precisely what the Michigan courts have done here), as well as the authority interpreting this Clause, but he also completely ignores the application of relevant Michigan statutory law to this issue, specifically the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171, et. seq. (the "Act"). The Act provides a mechanism for the enforcement of foreign judgments and was designed, in no small part, to create a level of consistency for the Courts and litigants. The Court of Appeals found that the Act not only applied to these proceedings, but that it was dispositive on the issue of whether Michigan law applies. Quoting directly from the Act, the Court of Appeals found that a foreign judgment filed under the Act has "the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the circuit court, the district court, or a municipal court of this state **and may be enforced or satisfied in like manner.**" MCL 691.1173 (emphasis added). Thus, according to the Act, issues of satisfaction, like other enforcement issues, are controlled by Michigan law.

In the lower courts, Petitioner argued, unsuccessfully, that the Act had no application to his defenses. Apparently, realizing that the language of the Act fully supports the application of Michigan law to his defenses, Petitioner changed his position and argued before the Michigan Supreme Court that the lower courts erred in even applying the Act to these proceedings, because Respondent elected to file an action to enforce its Judgment, as opposed to merely registering the Judgment under the Act. One can only assume that Petitioner realizes the absurdity of this

argument, as nowhere in his brief submitted to this Court is this argument even mentioned.[8]

There has never been an issue in this case regarding whether or not Michigan should give full faith and credit to the Indiana Consent Judgment; the Trial Court gave it full faith and credit by entering an order domesticating the Judgment. Instead, Petitioner argues that the Michigan courts have somehow misinterpreted the Full Faith and Credit Clause by refusing to apply Indiana law to the question of whether Respondent can now enforce and collect on the Judgment. Not only is Petitioner wrong on this issue, but, respectfully, this issue does not warrant review this Court.

Nevertheless, addressing this issue, this Court has always adhered to the principle (which is consistent with Michigan statutory law) that the forum state's law applies to the enforcement of the judgment, not the laws of the rendering state. In *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234; 4 L. Ed. 378 (1818), this Court confirmed that a judgment of a state court has the same credit, validity and effect, in every other

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[8] There is absolutely no justification or support for the position that foreign judgments duly domesticated through a suit filed in Michigan (which is precisely what occurred here) should be treated differently by the Courts of this state than foreign judgments that are merely registered with the clerk's office. If this argument were accepted, not only would the consistency of the treatment of foreign judgments be lost (and the purpose of the Act defeated), but litigants would now be able to choose for themselves the law that would apply to their proceedings simply by electing the means in which they domesticate their judgment in Michigan. The results would be disastrous.

court within the United States, which it had in the state where it was rendered. *Id.* at 235. However, this was not the last word on the Full Faith and Credit Clause. In *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 10 L. Ed. 177 (1839), this Court once again discussed the effects of the Full Faith and Credit Clause,

> If a judgment is conclusive in the state where it is pronounced, it is equally conclusive, everywhere, in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state...It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject matter of the suit.

Id. at 326. With respect to a state's ability to control defenses to remedies on the judgments of another state, this court held:

> ...there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits.

Id. at 328. More recently, and directly in line with this reasoning, this Court has held that "Full faith and credit...does not mean that States must adopt the practices of other States regarding the time, manner,

and mechanisms for enforcing judgments", but rather enforcement "measures remain subject to the even-handed control of the forum law." See *Baker v. General Motors Corp.*, 522 U.S. 222, 235; 118 S. Ct. 657; 139 L. Ed. 2d 580 (1998) (citing, *Restatement (Second) of Conflict of Laws* § 99 (1971).

This Court's focus on the "even-handed" enforcement of judgments is critical. To require states to apply the law of the rendering state for enforcement purposes would be to impose on the courts of each state the burden of attempting to apply differing enforcement standards within its own boundaries. The result would be that some judgments would be afforded greater status for purposes of enforcement than others, based solely on the location of where the judgment was rendered. This result would actually be contrary to the purpose of the Full Faith and Credit Clause, which was to create an environment where judgments were treated "equally", and where the law of the domestication—or forum—state governed as to the enforcement of the judgment.

In fact, while the Full Faith and Credit Clause prevents a state from altering the *merits of and substantive provisions of a sister-state's judgment*, the enforcing state (in this case Michigan) is entitled—and in fact encouraged—to apply its own law regarding enforcement in order to place all judgments on an equal footing within the state. Petitioner ignores these basic principles in attempting to make his Full Faith and Credit argument, in essence asking this Court to grant his Petition in order to consider an argument in

contravention of almost 200 years of American jurisprudence.[9]

As has been previously stated, but deserves mention again, the basic fallacy in Petitioner's argument is that he did not raise in the lower courts, and is not raising now, *defenses to the Judgment itself*. In other words, substantive provisions of the Indiana Consent Judgment are not being, and have never been, challenged. Moreover, the Judgment itself has never been challenged, nor has Petitioner challenged its entry by the state court in Indiana. As the Michigan Court of Appeals held, "the consent judgment is not being challenged here," but rather "Clapper is trying to avoid enforcement of the judgment."[10]

Further on this point, the Court of Appeals specifically addressed—and directly rejected—Clapper's often repeated argument that his defenses are not defenses to the "manner of enforcement" of the

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[9] Interestingly, Petitioner's dispute of the application of Michigan law and procedure to the enforcement of the Judgment is contrary to the very procedural authority he relied on in the Trial Court to challenge the Judgment. In his motion for summary disposition in the Trial Court, Petitioner relied on MCR 2.612 (C)(1)(e), as authority necessary for the Trial Court to relieve a party from final judgment on the grounds that "the judgment has been satisfied, released or discharged...." (Petitioner's Brief in Support of His Motion for Summary Disposition, p.8). His fatal error then, which has created his predicament now, was his failure to recognize that his argument as to why the Judgment is satisfied is based entirely on a defense *arguably* recognized by the courts in Indiana, but not by a single court in Michigan.

[10] *See* App. A to Petitioner's Brief, p. 8a

Judgment, but rather to the "viability" of the Judgment. As stated by the Court of Appeals, Clapper's argument "elevates form over substance" because "[c]learly TacCo is seeking to enforce the judgment against Clapper, and Clapper is resisting enforcement by raising various arguments, including the strawman argument."[11] The bottom line: no matter how creatively the Petitioner tries to frame his position, or how passionately he attempts to persuade this Court that the Full Faith and Credit Clause of the United States Constitution is in jeopardy if the lower courts' decision is permitted to stand, there is no "federal" controversy here, and no question of law or constitutional interpretation worthy of review by this Court. Quite simply, as this Court itself has held, Michigan has the right to apply an even-handed approach to the enforcement of judgments within its jurisdiction, subjecting all judgments, whether decided by the courts in Michigan or by the courts of another state, to the same rules governing enforcement and satisfaction. *M'Elmoyle v. Cohen*, *supra*.

Finally, Petitioner argues that under the *Restatement (Second) of Conflict of Laws* §§ 115 and 116 (1971), Indiana law should be applied to these enforcement proceedings, and his "strawman" theory considered. Quoting from Section 115 and 116 of the *Restatement*, Petitioner argues that Indiana law should be applied to determine whether equitable relief can be obtained against the Judgment, and that Respondent cannot obtain relief in Michigan that is

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[11] *See id.* at p. 7a.

greater than the relief that could be obtained in Indiana.

Once again, these Sections of the *Restatement* do not apply to the facts of this case, or to a determination of the issues now presented. First, as the Court of Appeals noted, "Clapper has cited no basis for obtaining equitable relief against the judgment, which was a validly signed and entered consent judgment."[12] Thus, there is no legal or factual basis to support Petitioner's theory that he is seeking equitable relief on the Judgment. Second, Respondent has never attempted to obtain relief greater than the relief consented to by Petitioner in the Judgment itself. In reality, it is Petitioner that is seeking to modify the terms and effectiveness of the Judgment by claiming it has been satisfied under Indiana law as a result of post-judgment activity.

As for the Judgment itself, it is undisputed that Petitioner has never paid a penny toward satisfying it. It is also undisputed that Respondent has never received a penny toward payment on the Judgment. Finally, it is undisputed that the Judgment has never been discharged under Indiana law, nor is there any other order finding that the Judgment has been satisfied. On this point, the Court of Appeals concluded:

> Here, the judgment has *not* been discharged and there is certainly no satisfaction of judgment found in the record. Indeed the consent

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[12] *See* App. A to Petitioner's Brief, p. 7a.

> judgment, under which Clapper is liable remains in effect, and TacCo is seeking to enforce it.[13]

Quite simply, there is no merit to a single argument raised by Petitioner.

In short, this action involves nothing more than the enforcement, under Michigan law, of a foreign judgment, duly recognized and domesticated against a Michigan resident. Under Michigan law, foreign judgments are to be enforced and satisfied as any other judgment entered by a Michigan Court.[14] Accordingly, the Trial Court—as affirmed by the Court of Appeals—was correct in applying Michigan law, and not looking to Indiana law, in determining what defenses were available to enforcement of the Judgment in Michigan.

Respondent respectfully submits that Petitioner has not only failed to provide a basis for reversal of the decision of the lower courts, but, perhaps more importantly, he has utterly failed to provide a single justification that would warrant this Court's review of this matter and a grant of the instant Petition.

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[13] *See id.*

[14] MCL 691.1173.

CONCLUSION

For the foregoing reasons, Respondent, TacCo Falcon Point, Inc., respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

Circuit Court Number 2002-042917-CZ

[Dated May 31, 2006]

TACCO FALCON POINT, INC.,	)
a Texas Corporation,	)
Plaintiff,	)
	)
v	)
	)
DAVID M. CLAPPER,	)
Defendant and	)
Third Party Plaintiff.	)
	)

BEFORE THE HONORABLE FRED M. MESTER,
CIRCUIT JUDGE
Pontiac, Michigan - Wednesday, May 31, 2006

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[p.2]

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WITNESSES: Plaintiff
None

WITNESSES: Defendant
None

EXHIBITS
None

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Pontiac, Michigan
May 31, 2006

THE CLERK: Calling Case Number 02-042917-CZ, *TacCo versus Clapper*.

THE COURT: Your appearances, please.

MR. MYCHALOWYCH: Andrew Mychalowych appearing on behalf of the Defendant/Counter Plaintiff/Third Party Plaintiff David Clapper.

MR. JACKSON: Peter Jackson for American Realty Trust and Investors.

MR. LEFKOFSKY: Steven Lefkofsky, your Honor, on behalf of the Plaintiff and Craig Davis from my office as well is here. So we're both present.

THE COURT: All right. Fine, thank you. Between this and the Froling matter I think we've got the entire bar.

Gentlemen, as you know my, or I should say our way of handling things is first we'll read all these several motions and then proceed to give you each an opportunity to articulate your respective positions. There

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are three basic motions. You can be seated, please.

Before the Court there's a Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) no genuine issue of material fact.

Defendant Clapper's Motion for Summary Disposition as to Plaintiff pursuant to (C) (9) a failure to state a valid defense and (C) (10) and Clapper's Motion for Summary Disposition to Clapper's claim against Third Party Defendants pursuant to (C) 9 and (10). That's filed in the alternative Defendant's Motion for Summary Disposition as to Plaintiff and that's to be heard if the Court denies the Defendant's Motion for Summary Disposition.

The Plaintiff filed this Complaint on August 7, 2002 to domesticate and enforce an Indiana Judgment, Consent Judgment, that is, for 3.2 million dollars in this state pursuant to the Full Faith and Credit clause of the United States Constitution. Plaintiff had been assigned the right to enforce it by Inland Mortgage Corporation.

Defendant Clapper filed a

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counterclaim against the Plaintiff alleging the following; Counts 1 through 4 are against ART Midwest LP and Count 5 allegedly seeks contribution from Third Party Defendants ARI, ART and ART Midwest for any amount that Clapper pays on the Indiana judgment. Judgment was entered on Counts 1 through 4 on November 18, 2002. The remaining issues in this case involve the resolution of the defenses asserted by Clapper. We have a date certain within two weeks of June 13, 2006, and that is a date certain.

First, I'll address the Plaintiff's Motion for Summary Disposition. They assert the Defendant has three defenses: One, that Plaintiff is a strawman for ART and that when Plaintiff got the judgment from Inland, it was satisfied and discharged; two, Plaintiff sold the property to itself for less than the true value resulting in a fraudulent conveyance and; three, the Plaintiff failed to sell the property in a commercially reasonable manner and cannot recover any deficiency.

First, the Plaintiff argues that the strawman defense has no foundation in

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Michigan law and the general rule in Michigan is that the intent of the parties governs when it comes to determining whether a judgment has been satisfied.

Further, the Plaintiff argues that the foreign cases on which Defendant relies are distinguishable from these facts and are based on principles of equity not present here. Plaintiff asserts that the facts of this case do not even support the strawman defense.

Plaintiff also contends that there is no basis for the fraudulent conveyance argument because Defendant consented to the Sheriff's sale in the Consent Judgment and because inadequacy of price cannot vitiate a foreclosure sale, and they refer me to *Chabut versus Chabut* case.

Lastly, Plaintiff argues that there are no facts to support the argument that the sale was not commercially reasonable.

Now, Defendants have responded by asserting that ART paid money directly to Inland to eliminate the liability of the primary obligor ART Country Squire and ART

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under the Judgment. Thus, Defendant claims that to the extent that the judgment is satisfied as to the primary obligor and ART as guarantor, it is satisfied as to Defendant, a co guarantor. We're talking about Clapper then. Defendant also notes that Plaintiff cannot abrogate Defendant's defenses just because the foreign judgment was domesticated in Michigan.

As to the strawman defense, Defendant argues that it is available in Indiana and is not eliminated just because Plaintiff filed this action to domesticate the

judgment in Michigan. However, Defendant asserts that the Full Faith and Credit allows Defendant to raise it in Michigan, referring the Court to *Hampton versus McConnel* case, and argues that the agreement between ART and Inland and the agreement between Plaintiff and Inland demonstrate that their intent was the payment to Inland would satisfy the judgment and there would be no deficiency. The Defendant reviews Plaintiff's analysis of the cases on which Defendant relies on pages 9 through 16 of the respective brief and notes

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that the cases support a finding that the judgment has been satisfied.

Finally, Defendant argues that there is evidence to support the defenses of fraudulent conveyance and that the sale was not commercially reasonable.

The Defendant Clapper's Motion for Summary Disposition is the Plaintiff argues, first argues that the Court can set aside the judgment pursuant to MCR 2.612 (C) (1) (e), as it has been satisfied because Plaintiff was a strawman for ART, and Defendant provides evidence from Wachovia Bank that ART paid 1.5 million directly to Inland on March 13, 2002. Defendant asserts that the negotiation of the transaction with Inland was orchestrated by ART with the intent to extinguish ART'S obligation as a judgment debtor and then asserts that there's no deficiency and Plaintiff is not entitled to recover any money from the Defendant and that in any

circumstance, the most that Plaintiff could collect is $500,000.00 based on payments made by ART.

Now, the Plaintiffs have responded

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in referring to the Defendant's factual misrepresentations. Plaintiff again makes the argument that the strawman defense is not recognized in Michigan.

Defendants reply by disputing the specific facts. Plaintiff claims that Clapper misrepresented any facts. Defendant argues that Plaintiffs admits that the judgment is satisfied as to Defendant with regard to the 1.5 million paid although Plaintiff states the satisfaction is as to Inland only. Defendant argues that to the extent that Inland cannot enforce the judgment against Clapper, neither can the Plaintiff.

Next, Defendant argues that Plaintiff cannot dispute that ART paid Inland directly and that Plaintiff provides no evidence of the loans between the parties to which it refers.

Now, Plaintiff's Motion for Summary Disposition and Defendant's Motion for Summary Disposition as to the Plaintiff. Now, that's what we've discussed. Now, I would ask you to punctuate, if you will, your respective positions on that and we'll take care of the

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other motions later on. Thank you.

You've basically set out your arguments in your briefs, have you not?

MR. MYCHALOWYCH: I have, your Honor. I would just like to point out one item.

I did file after the reply Brief, which was the last brief that was filed by Plaintiffs to our Summary Disposition, there was a statement in that reply brief which we did not have the opportunity to respond to. I did file a supplemental brief, although I was informed that the Court may not have reviewed that because it was filed after the reply brief, but I wanted to point out very briefly that as to the issue of the application of law that on Page 2 of TacCo's reply brief in support of this Motion for Summary Disposition, TacCo cites to the restatement second conflict of the laws 1971 for the proposition that enforcement that you cannot travel with the sister state judgment as preclusive.

Cited in that exhibit which is Exhibit 1 of TacCo's reply, if the Court would

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look to the end of that document it specifically says that if you look to not this topic, topic 3 as to enforcement, but you look to topic 4 with respect to defenses and then what I did is attached topic four, which starts, "The effect of these various defenses for the recognition or enforcement of a foreign judgment is discussed in topic four." That's at the bottom of Exhibit 1's reply brief.

At the top of four then, discusses defenses to recognition and enforcement and this is all in the context of the context of law. It says, "A judgment will not be enforced in other states if the judgment has been discharged or otherwise under the local law of the state of rendition." Here the state of rendition is the state of Indiana.

And then also it states that, "A judgment will not be recognized or enforced in other states if upon facts shown to the Court equitable relief could be obtained against the judgment in the state of renditia."

And the comments assess, "A judgment creditor will not be permitted to

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obtain greater relief than that to which is entitled under local law of the state where the judgment is rendered," again, Indiana.

Once the creditors receives the amount due under judgment for payment of money they can obtain no further monetary relief from any state.

The point, your Honor, is that what was stated in the TacCo's reply brief is look for this restatement of loss. This says that you don't go to the sister state or the state of renditia. The actual, if you continue to read, the balance of those states what it does say specifically is the method of enforcement is in the state where it's being enforced. That makes sense because -

THE COURT: (Interposing) As I said, it is indicated a judgment is recognized to the extent that it is given the same effect with respect to the parties. The subject matter of the action issued involved that it has in the state where it was rendered.

MR. MYCHALOWYCH: Exactly, your Honor. So what was cited as to enforcement makes sense because if they enforce it

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differently in Indiana than they enforce it in Michigan, then you can't get the Michigan Sheriff to learn Indiana law or something else. But that deals only with enforcement and not the defenses and the defenses in this case were available in Indiana. This motion for satisfaction of judgment was filed within a month of the entry of that judgment in February of 2002 and it's been pending. The fact that it's been removed or they chose to bring it here to Michigan doesn't eliminate those defenses.

Applying Indiana law then, it's specifically in the case on point is and also citing to, also picked up by *Lillie*. It says, the judgment was thus in fact brought by Daggert, and I'm citing from *Lillie*, quote, "one of the joint tort fees of judgment debtors is clearly operated as an entire discharge of satisfaction of judgment even although the purchase was essentially made by *Lillie* and the assignment taken in his name and that would keep the judgment alive as an obligation against dinor" (phonetic).

In *Tomkins* cited on Page 17 of my

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brief, "It's a rare scheme to keep the judgment alive but it has been paid once before to nonavail. The Judgment was then discharged and satisfied and not revitalized."

I think the law is clear with respect to what happens when a co guarantor, a co surety pays money, and in this case I didn't come up with any evidence other than the Wachovia documents that we didn't discover until this Court allowed us to finally give discovery in this case and we subpoenaed those documents and then they came up with their internal documents that showed not only did ARI wire this money directly to Inland to satisify the first 100,000 before TacCo even existed -

THE COURT: (Interposing) But that's all put out in your briefs.

MR. MYCHALOWSKY: It is, your Honor.

The last point I'll make then is there's a citation made that says that if a surety pays it doesn't extinguish the judgment. In this case there's a blurring of the distinction between the surety and the

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primary obligor. If the surety pays it can pursue the primary obligor on the claim of indeminification because it was the primary obligor's obligation. However, the surety pays, it extinguishes it as the co sureties and the judgment is satisfied. If the primary

obligor pays, and in this case the credit was given to our Country Squire as the primary obligor, then it satisfies the sureties because it was his responsibility in the first place.

THE COURT: Isn't that the argument you made in your brief, Counsel?

MR. MYCHALOWYCH: Thank you, your Honor.

THE COURT: You have a response?

MR. LEFKOFSKY: Just very briefly, your Honor. We're proceeding here in Michigan under a domesticated judgment. We're proceeding under the Court Rule that talks about their right to plead defenses as to judgments that would be applicable to judgments entered in Michigan. Michigan doesn't recognize the strawman argument, therefore, the defense is inapplicable. Even

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if it did, we've cited the laws as to why it's inapplicable and it's all in the brief.

THE COURT: Thank you. No one else has anything to say at this juncture. I think it's all in -- you know, this is much reading material we have, and as you know my staff attorney reads it, I read it, we read it thoroughly.

Let's address Plaintiff's Motion for Summary Disposition and Defendant's Motion for Summary Disposition as to Plaintiff.

The first issue is whether the Plaintiff can raise the defense that Plaintiff is merely a strawman for ART *and, thus, the judgment has been satisfied.*

The Court first addresses the issue of Defendant's affirmative defenses on April 9, 2003. At that time, the Court gave Full Faith and Credit to the Indiana judgment. It stated that Michigan courts have consistently held that, "A judgment entered by a court of competent jurisdiction is not subject to collateral attack against the underlying obligation." The Court found that although it could not relitigate issues

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related to the underlying judgment, it could address allegations and issues that arose subsequent to the Consent Judgment as part of the enforcement procedures. Thus, because Defendant's affirmative defenses arose out of actions that took place after the judgment was taken, Full Faith and Credit does not bar those defenses from being raised related to the enforcement in Michigan. However, the next question is whether the strawman defense can be raised in Michigan where it is not recognized here but is available in Indiana as a defense.

Defendant relies on a Michigan Supreme Court case, *Ward v Hunter*. That case held that Defendant could not use the defenses of set off and recoupment and could not counterclaim for fraud where he could not have done so in the state where the judgment was obtained and where the strawman defense could have been raised in Indiana. Thus, that case is factually

distinguishable from this one and does not apply to this case.

Further, the United States Supreme Court case on which Defendant relies *Hampton*

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versus McConnell, only states that the Full Faith and Credit requires that the judgment of a state court, which had jurisdiction of the parties and the subject matter be given the same validity in the courts of every other state and be equally conclusive upon the merits. Thus, it does not stand for the proposition that defenses valid in one state can be raised in another.

The law is also clear that, "Full Faith and Credit, however, does not mean that States must adopt the practices of other States regarding the time, manner and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law," that is this Court's law and that's the *Baker versus General Motors Corp* 522 US 222. Thus, the Court is satisfied that the strawman defense is not available to Defendant as it is not recognized in the state of Michigan.

The next question is whether Plaintiff sold the property in a commercially

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reasonable manner. Defendant relies on the fact that before the sale for one million, the property was valued

at $1.95 million by Integra a few months after the foreclosure sale, ART'S chairman entered into a purchase agreement for $3.4 million, creating an issue of fact. Plaintiff asserts that it was sold in accordance with Indiana law and Defendant received notice of it. Defendant cites MCL 600.3280, however, that involves "foreclosure by advertisement" and states that it does not apply foreclosure sales made pursuant to a court order, such as in this case. As evidence, Defendant relies on Ted Stokely's testimony that ART was aware that he was willing to pay $3.4 million, yet Plaintiff only bid $1 million. Defendant also relies on the appraisal by Integra a few months after the sale of at least $1.95 million.

In *Chabut versus Chabut*, the Court held that "inadequacy of the sale price is not sufficient, in and of itself, to compel the setting aside of a foreclosure sale." Further, Michael Lady of Integra testified that a property could sell for more than 25%

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less than the appraised value. Based on the evidence that has been submitted, this Court finds that the fact that a better price could have been obtained is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. Defendant has not provided any evidence that the appraisal a few months later establishes that the price was not reasonable in light of Mr. Lady's testimony about foreclosure sales. Defendant has not alleged that the sale was conducted improperly under Indiana law. Defendant's argument that the price was too low is based on speculation and conjecture. In addition,

Defendant has not provided any expert opinions that the sale was commercially unreasonable and the Court must conclude that Defendant has failed to demonstrate the existence of a genuine issue of material fact regarding whether the sale was conducted in a commercially unreasonable manner.

Lastly, this Court will address the question of whether Plaintiff sold the property to itself for less than the true value resulting in a fraudulent conveyance.

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This claim is based on Defendant's assertion that Plaintiff sold the property to itself for less than the fair market value as evidenced by the subsequent sale of $3.4 million.

In *BFP versus Resolution*, the United States Supreme Court held that with regard to a bankruptcy fraudulent transfer provision, "reasonably equivalent value" for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with and that . . . fair market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. The Court stated that "fair market value presumes market conditions that, by definition, do not obtain in the forced-sale context, since property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions."

Although this case is not in the context of a bankruptcy, this Court finds that this reasoning is instructive in that in this

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situation as well, the price at a foreclosure sale is likely to be worth less than property sold without the restrictions imposed by the foreclosure procedure. Thus, the Court finds that Defendant's affirmative defense of fraudulent conveyance must fail and Plaintiff's judgment must be enforced and therefore Defendant's Motion for Summary Disposition is denied and Plaintiff's Motion for Summary Disposition is granted. In light of the Court's ruling on the motions with regard to enforcement of the judgment, the Court will now address Defendant's Motion for Summary Disposition as to third party defendants.

Defendant Clapper's Motion for Summary Disposition as to Clapper's claims against the third party defendants states basically and argues that no fact issue exists as to Defendant's claim for contribution against third party defendants. Defendant notes that as a co obligor under the judgment sought to be enforced by Plaintiff, Defendant is entitled to a contribution from third party defendants. Defendant also seeks to

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immediately execute on judgment entered against third party defendants in favor of Defendant unless they deposit $1.2 million in the same account that Defendant deposited the money to stay execution by

Plaintiff or post proper security and that half be released to Defendant.

Third party defendants have responded by arguing that the third party complaint does not seek contribution from third party defendants in that Count V only seeks relief against ARI and ART, not ART Midwest. Further, third party defendants argue that ARI's answer states a valid defense that Defendant's motion does not overcome. Third party defendant argues that Defendant's motion is really a disguised request for declaratory judgment. Third party defendant notes that Defendant admits that he is not yet entitled to a money judgment.

Next, the third party defendant contends that Defendant fails to establish facts to support his contention that ART is responsible to contribute half of the total liability.

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Now, Defendants have replied by noting that because he is not seeking Summary Disposition as to ART Midwest but only as to ART and ARI, Third Party Defendant's argument is moot. Defendant asserts that ART and ARI are the same for all relevant purposes and claims that he is entitled to a judgment for contribution based on the fact that he has had to deposit over $2.5 million in cash with the court. At a minimum, Defendant claims he is entitled to a judgment on liability.

Finally, Defendant contends that as a co guarantor, Defendant is entitled to 50% contribution from the other co guarantor on the judgment, ART.

Anything you wish to argue on this?

MR. MYCHALOWYCH: Briefly, your Honor. The argument that you look at just of judgment in order to determine between the Defendants what the contribution is, it doesn't take into consideration -- I've cited cases that show you to look at the kind of judgment itself in relationship to the parties. You have three primary obligors, those being ART, Country Squire and Inland.

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Those are primary obligors. If you only look at perhaps our Country Squire, our Country Squire paid the judgment which is was obligated to do as a primary obligor all along. It couldn't then seek contribution among the remaining parties because it had that obligation. You look at where the relationship of the parties are. There are two guarantors and there is no dispute that there are two guarantors. It's 50/50 between them. They can then seek indemnification from the parties below, which hasn't -- those claims haven't been brought here, but between the post sureties it's 50/50 and there hasn't been any -

THE COURT: (Interposing) So you're asking for summary disposition as to ART ?

MR. MYCHALOWYCH: Yes, as 50 percent of any amount the Court determines that Mr. Clapper is responsible for.

THE COURT: Thank you. Let me hear from ART.

MR. JACKSON: Your Honor, as far as the percentage issue goes it would be one

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thing if the Inland had sued on these guarantees and it recovered a judgment on the guarantees.

THE COURT: You agree that co obligors can be liable to each other in contribution?

MR. JACKSON: Yes. And the issue we have is in the percentage here. The debt on which the contribution is sought was reduced to a judgment. Whatever obligation those Defendants had were merged into that judgment as to which there are five Defendants and I would therefore say that the pro rata portion which is what the law requires is one fifth.

Secondly, your Honor, I'm concerned here that Mr. Clapper may get out in front of the process if a money judgment is given to him against ART before Mr. Clapper has actually satisfied his obligation to the Plaintiff. I don't have any problem once that it's clear that once that money is paid by Mr. Clapper, or I should say once the Plaintiff receives the money that's on deposit with the Court that Mr. Clapper would have a

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contribution claim against ART, but Mr. Clapper is very likely to appeal this, to appeal the Court's ruling.

THE COURT: My ruling?

MR. JACKSON: And I just want to make sure we don't have a situation where my client is out, where Mr. Clapper is out, executing a judgment against my client while the principal case is still on appeal or still being -- or it is still at issue. Thank you, your Honor.

THE COURT: Thank you. Nothing further? I think you both said everything.

This Court has ruled that Plaintiff is entitled to a money judgment and the right to enforce it. I now will address the contribution claim;

Defendant's Amended Third Party Complaint seeks contribution from ART and ARI only based on the allegation that ART and its successor ARI, as co guarantors on the Inland note, caused the partnership, that's ART Midwest, to default on the Inland note. Defendant does not seek contribution from ART Midwest.

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Thus, the first issue that the Court must address is whether ARI is the successor to ART by merger, as alleged by Defendant in Paragraph 72 of the Third Party Complaint. Third Party Defendant denies that allegation. Although Defendant states numerous times

in its pleadings and argument that ARI is the successor of ART, he provides no evidentiary support for that allegation and, thus, there is no basis for contribution as to ARI.

As to ART, Defendant asserts that the claim for a 50% contribution is based on the fact that ART was a co guarantor on the Inland note. ART contends that there were five Defendants listed on the Indiana judgment and, thus, ART's share would be no more than one fifth as has been argued here this morning. However, Defendant notes that he can only seek contribution from another co guarantor and that because only Defendant and ART were sureties and the others were all primary obligors, only ART is liable for contribution. There is no dispute that ART and Clapper were co guarantors. Thus, the

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question is whether ART is liable for 50% or one fifth of the Judgment. The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against others to obtain from them payment of their respective shares, and that's *Calwell versus FOX* case.

Further, the law provides that "Where one of two or more sureties for the same obligation has paid more than his share of the debt, he is entitled to contribution from his co sureties to reimburse him for the excess paid over his share in order to equalize

common burden, but it is only where parties are bound to discharge a common obligation that they are treated as "co-sureties." That's *French versus Young*.

I'm satisfied, therefore, that Defendant's Motion for Summary Disposition is granted as to ART.

MR. MYCHALOWYCH: And they're

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responsible then for 50% of the amount due?

THE COURT: They're responsible for 50 percent. Thank you.

MR. LEFKOFSKY: Your Honor, just to clarify judgment granted to TacCo on all defenses and all claims that were brought, can we get an Order entered today? Would that be okay with you?

THE COURT: I agree.

MR. JACKSON: Your Honor, are we granting a money judgment that permits the Defendant to execute against my client before the client has done anything on -

THE COURT: (Interposing) I think it has to first be paid over to them, then he has to go against you. Thank you.

MR. MYCHALOWYCH: So a Judgment would be entered against ART for 50 percent of the amount?

MR. JACKSON: Subject to.

THE COURT: Subject to the payment of your amount to TacCo.

MR. MYCHALOWYCH: Now, if we choose to appeal and I haven't spoken to my client, if we choose to appeal the amounts

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already posted would serve as a bond for purposes of appeal, the Court is then ordering that until that appeal is exhaustive that the Judgment with respect to ART would remain in abeyance?

THE COURT: As I understand it, first we have to take care of your obligation to TacCo. Your obligation to TacCo first, and then I would agree that ART has a 50 percent obligation under this obligation and, therefore, it has to pay you 50 percent of what you have to pay to TacCo. I think that explains it. I would ask that you enter an Order and not leave until that Order is executed by this Court and whatever your client desires to do in regard to the Judgment, I think we have to address it at that time.

MR. MYCHALOWYCH: Including, your Honor, in terms of whether or not the cash amount posted now would serve as a bond?

THE COURT: As bond. That's right. I'm not ready to address that at this time. Thank you.

(Proceedings concluded.)

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STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, Gwendolyn D. Finley, Certified Reporter of the Sixth Judicial Circuit Court, State of Michigan, do hereby *certify that the foregoing pages 1-33 inclusive, comprise a true and correct transcript of the proceedings and testimony taken in the matter of TacCo Falcon Point, Inc., versus David M. Clapper, 2002-042917-CZ, on Wednesday, May 31, 2006.

/s/
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August 18, 2006

*This is not a certified copy without an original signature.